Ref. No. 354

UNITED STATES OF AMERICA
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,
Complainant,

v.

PPJV, INC., DBA PUBLISHERS PRESS,
Respondent.

8 U.S.C. 1324a
PROCEEDING

Case 90100306

ORDER DENYING RENEWED MOTION
FOR SUMMARY DECISION

On June 24, 1991, Complainant filed a Supplementary Brief and Renewed Motion for Summary Decision Pursuant to 28 CFR 68.36. The renewed motion essentially seeks partial reconsideration of my June 4, 1991, Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision.

Complainant asks reconsideration of the June 4 Order insofar as it denied summary decision on the Complaint Count 3 allegation that Respondent violated Immigration Reform and Control Act of 1986 [IRCA], 8 U.S.C. §1324a.(a)(1)(B), by failing to properly prepare Forms I-9 for employees Ignacia G. Ivoa, Maria E. Lemus and Jose L. Navia. The June 4 Order concluded that that Respondent's "substantial compliance" defense raised material issues precluding summary decision in favor of Complainant.[1]

To briefly recapitulate, the facts, as they now appear, are as follows: The three pertinent Forms I-9 proffered for summary decision purposes are admittedly authentic. Each form suffers a single defect. All three employees claimed to be resident aliens by checking the second box in Section 1, Form I-9. None of the three individuals entered their alien registration numbers [ARN] as called for at the end of the same line in Section 1.

Section 2 of these three Forms I-9 reflect that all 3 employees presented a California drivers license and an unrestricted social security card to establish their identity and employment eligibility, respectively. No claim is made elsewhere in the Complaint or in any of the three briefs Complainant has now filed in this summary decision matter that Respondent unlawfully hired or continued to employ any of these three individuals. Likewise no assertion is made that the employees' claims to be resident aliens are untruthful or questioned in anyway. Complainant seeks an order compelling Respondent to pay an IRCA civil money penalty of $600, or $200 per Section 1 omission.

Complainant's argument on behalf of the renewed motion is essentially two pronged. First, Complainant traces the Congressional delegation of authority

[1] No final determination was made concerning the "substantial compliance" defense nor is such a determination made here. Complaint Count 1 and this portion of Count 3 are now scheduled for hearing on September 12, 1991.

to establish regulations under IRCA. Based on that authority, a regulation was promulgated at 8 CFR §274a.(b)(1)(i)(A) which read at the pertinent time:[2]

> (b) Employment verification requirements--(1) Examination of documents and completion of Form I-9.
> (i) An individual who is hired or is recruited or referred for a fee for employment must:
> (A) Complete Section 1 -- "Employee Information and Verification" on the Form I-9 at the time of hiring...

In conjunction with this regulation, Complainant points to the instruction on the reverse of the Form I-9 (published with the IRCA regulations implementing the employment verification system) which states that alien employees "must" enter their ARN in Section 1. A reading of the instruction and the foregoing regulation together establishes, in Complainant's view, that the disclosure of the ARN in Section 1 by all alien employees is within the mandatory penumbra of regulations authorized by the Act. Those same instructions also provide that employers "must" enter the identification number and expiration date, if any, for employee documents presented to establish identification and employment eligibility.

The second prong of Complainant's argument seeks to justify the requirement that alien employees enter their ARN in Section 1 of Form I-9 in all cases. Specifically, Complainant asserts:

> This suggestion [that the ARN may be "superfluous" in the circumstances found here] presupposes that establishing identity and employment eligibility in the United States is the sole purpose of the I-9. With regard to aliens, establishing identity and employment eligibility is not the sole purpose of the Form I-9. The Form I-9 is used by the Immigration and Naturalization Service to identify, locate, and if necessary remove illegal aliens from the United States...[Emphasis added]

Citing 8 U.S.C. §1324a.(b)(5), Complainant asserts that Congress specifically provided that the Form I-9 "may be used for enforcement of all provisions of the Immigration and Nationality Act (Act)." Hence, Complainant's argument continues, because the ARN may be useful to the Immigration and Naturalization Service (INS) for the enforcement of some provision of the Immigration and Nationality Act of 1952 and all subsequent amendments thereto, a regulation requiring that employers -- under threat of a civil money penalty -- insure that alien employees in all cases enter the ARN as called for in Section 1 of Form I-9 is justified.

IRCA's employment verification system is set forth in 8 U.S.C. §1324a.(b). Subparagraph (A) thereof provides:

> The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining --

[2] The disputed forms were prepared in November 1987 and December 1989

> (i) a document described in subparagraph (B), or
>
> (ii) a document described in subparagraph (C) and a document described in subparagraph (D).
>
> A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of such sentence, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such a document. [Emphasis added]

Subparagraph (B), referenced in the quoted subparagraph A(i), contains a list of specific documents any one of which will suffice to establish both an individual's identity and employment eligibility under the verification system and authorizes the Attorney General to designate other suitable documents for this combined purpose by regulation. Subparagraphs (C) and (D) list documents which will suffice to establish employment eligibility and identity, respectively, and also authorize the Attorney General to designate, by regulation, other documents of this nature.

Another IRCA regulation related to the latter portion of subparagraph (A) provides that " [a]n employer...may not specify which document or documents an individual is to present." See 8 CFR §274a.(b)(1)(v).

The Respondent's "substantial compliance" defense suffices, in my judgment, to question whether the omitted ARNs here are essential for any purpose related to the employment verification system authorized by Congress and whether the Complainant's enforcement approach effectively requires the production of the resident alien card notwithstanding the more liberal latitude provided in the statute.

Form I-9 -- the form "designated or established by the Attorney General by regulation" pursuant to the cited subparagraph (A) -- was drafted in general with a keen eye toward the requirements of IRCA. Employers are ultimately legally accountable for the completion and integrity of the Form I-9. U.S. v. Boo Bears Den, OCAHO Case No. 89100097 (1989). However, construing Form I-9 instructions as mandatory regulations, whether read alone with other regulations, is a questionable approach. See U.S. v. New Peking, Incorporated, d/b/a New Peking Restaurant, OCAHO Case 90100301 (June 18, 1991) Modification by CAHO of ALJ's Decision and Order @ p. 8.

Without doubt, it would be irrational to hold that any omission on a Form I-9 in every circumstance is an unlawful failure to comply with the employment verification system within the meaning of 8 U.S.C. §1324a.(a)(1)(B). For example, if these three employees had made the same omission in Section 1 but had provided their resident alien cards (as authorized by subparagraph (A)(i) and listed specifically in subparagraph (B) as a document satisfying IRCA's identity and employment eligibility requirements) to Respondent who, in turn, entered the ARN at the appropriate place on Section 2 of Form I-9, any effort to exact a civil money penalty because the same number was not redundantly

entered in Section 1 would be such an egregious elevation of form over substance as to raise serious due process questions about IRCA's administration. However, if one reads the Form I-9 instructions literally, such redundant entries are mandated.

The facts here reflect significant elements analogous to that example. The three employees attested under penalty of perjury that they were, at the time, resident aliens as required by 8 U.S.C. §1324a.(b)(2) which is silent with respect to any added requirement that the attesting employee claiming that status provide his or her ARN.

To comply with the employment verification system the three employees provided Respondent with a "combination of documents," which they swore were genuine, from subparagraphs (C) and (D) pursuant to subparagraph (A)(ii) rather than a single document authorized by subparagraph (A)(i) as in the hypothetical example. Indeed, the documents provided were the initial documents enumerated by the statutory drafters of subparagraphs (C) and (D).

As required in subparagraph (A), an attestation was entered on behalf of Respondent in Section 2 of each Form I-9 verifying that each individual was "not an unauthorized alien" based on an examination of employee documents presented. Moreover, the Respondent's agent entered the identification number of each document at the appropriate place in Section 2 of the disputed forms.

Complainant does not allege that the documents provided and memorialized on the disputed forms are inadequate to verify the identity and employment eligibility of the 3 employees involved. Any such claim would be clearly at odds with the statute as drafted. Moreover, Complainant's evidence in connection with its allegations in Count 1 of this same Complaint would appear to belie any such assertion.[3]

Instead, Complainant asserts that the INS may make multiple uses of the Form I-9, including identifying, locating and deporting illegal aliens and that the ARN is essential for these other activities. In support, Complainant cites 8 U.S.C. §1324a.(b)(5) which states:

> (5) LIMITATION ON USE OF ATTESTATION FORM. -- A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this Act and sections 1001, 1028, 1546, and 1621 of Title 18, United States Code.

Complainant believes the word "Act" as used in the above-quoted provision means the Immigration and Nationality Act of 1952 and all its amendments; hence, Complainant argues that multiple uses of Form I-9 is authorized by IRCA. To support its expansive interpretation of this limitation, Complainant relies

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[3] That evidence shows that Complainant gave Respondent "official notification" that Ricardo M. Navia had no legal basis to be employed in the United States based on information provided by the Social Security Administration that the social security number provided by Ricardo Navia -- whose I-9 is not at issue in this reconsideration matter -- did not apply to him.

on Blair v. City of Chicago, 201 U.S. 400, 475 (1905), a case which addresses statutory construction in a more general sense.

Complainant's claim concerning the meaning and scope of this limitation is subject to considerable question. IRCA's legislative history strongly suggests that Complainant's view of this limitation vastly overreaches and distorts Congressional intent. Thus, H.R. Rep. No. 682, 99th Cong., 2nd Sess. Pt. 1 @ p. 61, reprinted in 1986 U.S. Code, Cong. & Ad. News, p. 5649, 5665, states:

> The bill specifically prohibits the use of the attestation forms for purposes unrelated to the enforcement of this legislation or 18 USC 1546 -- relating to the fraud and misuse of various immigration documents. Concern has been expressed that verification information could create a "paper trail" resulting in the utilization of this information for the purpose of apprehending undocumented aliens. The bill is designed to insure that this information will not be used by the INS in its alien enforcement activities.

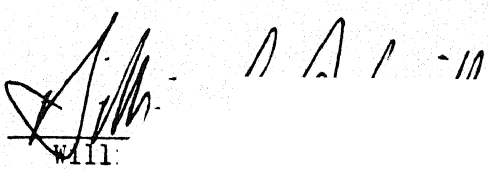
Unquestionably, the ARN would be a convenient tool for use by the INS to verify an alien's employment eligibility through its own records and can be used legitimately for that purpose. But insisting that employers, under threat of a penalty, insure that alien employees record their ARN in all cases is another matter.

In this case, the disputed forms arguably contain all of the information and attestations required by a literal reading of the statute. Although the forms do not reflect the employees' ARNs as arguably required by regulations issued under the pale of statutory authority, the purpose underlying the application of such regulations here, as articulated in the Complainant's supplemental brief, may well be directly and significantly at odds with prohibitions intended by Congress against: 1) INS's unrestricted use of the Form I-9; and 2) requiring employees to produce certain specific documents to establish their identity and employment eligibility.

In view of the foregoing, I remain of the view that Respondent's "substantial compliance" defense raises material issues precluding summary decision in favor of Complainant based on its renewed motion. Accordingly, the renewed motion is denied.

SO ORDERED.

Dated: July 17, 1991.



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